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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-856

SECURITY SAVINGS AND LOAN ASSOCIATION;
COUNTY OF ALAMEDA,
Petitioners,

v.

WESTINGHOUSE CREDIT CORPORATION;
AMERICAN ACCEPTANCE CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BURD, HUNT & FRIEDMAN
JOHN S. BURD
JOHN J. BARTKO
One Maritime Plaza, Suite 745
San Francisco, California 94111

JOHN J. WELSH
235 Montgomery Street
San Francisco, California 94104
Attorneys for Petitioner Security Savings and Loan Association

RICHARD J. MOORE,
County Counsel
T. J. FENNONE,
Deputy County Counsel
Alameda County Administration Building
1221 Oak Street
Oakland, California 94612

JOHN J. WELSH
Attorneys for Petitioner County of Alameda

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinion Below	1
Questions Presented	2
Statutory Provisions Involved	2
Jurisdiction	2
Statement of the Case	3
Reason for Granting the Writ of Certiorari	5
1. Does the Bankruptcy Court in a Chapter XI Proceedings Have Jurisdiction to Conduct Summary Proceedings Rather Than Plenary Proceedings Concerning Property Which Is Owned, But Not Possessed by the Debtor	8
2. If a Bankruptcy Court Can Conduct a Summary Proceeding When the Debtor Merely Owns the Property, Does the Debtor "Own" the Property When Title Remains in Another Pursuant to a Conditional Sales Contract?	15
3. Does a Bankruptcy Court in a Chapter XI Proceeding Have Jurisdiction to Make a Summary Determination Concerning Property Which Has Been Physically Seized and Is in the Custody of Local Taxing Authority in Accordance with Applicable Statutes Prior to the Commencement of the Bankruptcy Proceedings?	16
4. Does a Party Who Appears Before a Bankruptcy Court, Stipulating to Reserve Objections to Jurisdiction, Consent to the Bankruptcy Court's Exercise of Summary Jurisdiction?	18

Page

These Jurisdictional Questions Concerning Section 711 Raise Significant and Recurring Problems Affecting the Nature and Scope of Chapter XI Proceedings 20

5. Did the Court Below Err in Its Application of California Substantive Law Relative to Title Acquired by Purchaser at Tax Sale? 22

Conclusion 26

Appendix

A. Opinion and Judgment of Court of Appeals ..App. 1

B. Order denying motion for rehearing .....App. 19

TABLE OF AUTHORITIES

Cases	Pages
In re California Paving Company, 95 F. Supp. 909 (N.D. Ca. 1951)	11
City of Long Beach v. Mansell, 3 C.3d 465 (1970)	23, 24
Dohrman Company v. Security Savings and Loan Association, 8 Cal. App.3d 655, 87 Cal. Rptr. 782 (1970)	7, 22, 23, 24, 25
In re Lake's Laundry, Inc. 79 F.2d 326 (2nd Cir. 1935) cert. den. 296 U.S. 622 (1935)	15
Lockhart v. Garden City Bank & Trust Company, 116 F.2d 658 (2d Cir. 1940)	12, 13, 18
Loyd v. Stewart & Nuss Inc., 327 F.2d 642, 245 (9th Cir. 1964)	10
Mithers v. Barasch, 439 F.2d 1393 (9th Cir. 1971)	10, 11
Sada Yoshinuma v. Oberdorfer Insurance Agency, 136 F.2d 460-61 (5th Cir. 1943) cert. den. 320 U.S. 785 (1943)	12, 13
R.C.A. Photophone Inc. v. Huffman, 5 C.A.2d 401 (1935)	24, 25
Taubel-Scott-Kitzmiller Company Inc. v. Fox, 264 U.S. 426 (1924)	7, 16, 17, 18
Thompson v. Magnolia Petroleum Company, 309 U.S. 478 (1940)	6
Wilke v. Country Life Insurance Company, 423 F.2d 151 (9th Cir. 1970)	11

STATUTES

11 U.S.C. § 711 .....2, 6, 7, 9, 10, 13, 14, 15, 16, 20, 21

OTHER AUTHORITIES

Collier on Bankruptcy (14th ed. 1969) 8, 9, 10

Remington on Bankruptcy (6th ed. 1955) 8, 11, 13

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, Security Savings and Loan Association, and the County of Alameda, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 11, 1971, and modified in part by the Order Denying the Petition for Rehearing of October 8, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, as does the Order Denying the Petition for Rehearing, which modified that opinion.

No opinion was rendered by the District Court for the Northern District of California in this proceeding.

QUESTIONS PRESENTED

1. Does the bankruptcy court in a Chapter XI proceeding have jurisdiction to conduct summary proceedings rather than plenary proceedings concerning property which is owned, but not possessed by the debtor?

2. If a bankruptcy court can conduct a summary proceeding when the debtor merely owns the property, does the debtor "own" the property when title remains in another pursuant to a conditional sales contract?

3. Does a bankruptcy court in a Chapter XI proceeding have jurisdiction to conduct summary determination concerning property which has been physically seized by and is in the custody of the local taxing authority in accordance with applicable statutes prior to the commencement of the bankruptcy proceedings?

4. Does a party who appears before a bankruptcy court, stipulating to reserve objections to jurisdiction, consent to the bankruptcy court's exercise of summary jurisdiction?

5. Did the court below err in its application of California substantive law relating to the title acquired by a purchaser at a tax sale?

STATUTORY PROVISIONS INVOLVED

U.S.C., Title 11:

§ 711. Exclusive jurisdiction of debtor and property.

> "Where not inconsistent with the provisions of this Chapter, the court in which the petition is filed shall, for the purposes of this Chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 11, 1971. A timely Petition

for Rehearing was denied on October 8, 1971, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition for writ of certiorari requests this Court to review the decision of the Ninth Circuit affirming the orders of the District Court and the Referee in Bankruptcy. The Referee had granted petitions for the reclamation of personal property filed by Respondents American Acceptance Corporation and Westinghouse Credit Corporation. The circuit court's jurisdiction was conferred by Section 24a of the Bankruptcy Act, 11 U.S.C. § 47a, and that of the District Court by 28 U.S.C. § 1334.

Stockman Development Company, a limited partnership, composed of Harry James Stockman as general partner, and his wife Betty Stockman as the limited partner (hereinafter "Stockman"), owned the Edgewater Inn Hotel on property leased from the Port Authority of Oakland. Portions of the furnishings of that hotel were purchased by Stockman from respondents' assignors. Under the terms of these contracts of sale, title to this personalty remained in the vendor until the purchase price had been paid in full. Stockman was required by the terms of these contracts to pay all personal property taxes assessed by the County.

Stockman was not successful. Personal property taxes were not paid on the leasehold from the Port Authority or on any of the other personal property at the Edgewater Inn. So on March 30, 1966, Petitioner, County of Alameda, seized the hotel and its contents, including the property now claimed by Respondents. To satisfy the delinquent taxes, the County scheduled and noticed a sale of the seized property for May 19, 1966.

On May 18, 1966, an Involuntary Petition in Bankruptcy was filed against Stockman. The alleged bankrupt filed a petition pursuant to Chapter XI. The District Court restrained the tax sale scheduled for the following day.

The County of Alameda disputed the jurisdiction of the bankruptcy court immediately. The County contended that the property was seized prior to the filing of the petition in bankruptcy and so was no longer an asset of the bankrupt. But rather than risk contempt of court, the County entered into a stipulation with the debtor, which stipulation was approved by the Referee in Bankruptcy. By the terms of that stipulation the County reserved its objection to jurisdiction, and allowed the debtor to regain possession of the hotel. The County hoped it would be paid from a plan of arrangement.

On January 3, 1968, no plan of arrangement being approvable, the debtor was adjudicated a bankrupt. Respondent, American Acceptance Corporation (hereinafter "American"), had previously filed a Petition for Reclamation pursuant to its conditional sales contract, and Westinghouse Credit Corporation (hereinafter "Westinghouse"), filed its Petition for Reclamation February 5, 1968. No plan of arrangement being approved, the assets of the debtor began to be liquidated.

On February 13, 1968, the trustee conducted a public sale of all the personal property in the hotel, offering for sale only the debtor's equity, if any, in that property. This sale included the property owned by American and Westinghouse, and many other assets not involved in this proceeding. The sale was subject to the claims of creditors (including Respondents) and to the Petitioner's tax lien. No bids were received at the public sale, and Petitioner, Security Savings and Loan Association (hereinafter "Security"), later purchased the equity at private sale. This sale was confirmed by order of the bankruptcy court.

On February 14, 1968, Security, by purchase at its foreclosure, became the owner of the leasehold and buildings known as the Edgewater Inn Hotel. Security had appeared throughout the bankruptcy proceedings as a secured creditor holding the deed of trust to that property.

On February 28, 1968, after posting the property for sale, the Alameda County Tax Collector conducted his public sale of all of the personal property in the hotel. This sale included the property now claimed by American and Westinghouse. Petitioner Security bid in the full amount of the unpaid taxes, $18,214.35, and the petitioner, County of Alameda, delivered its bill of sale pursuant to California Revenue and Taxation Code 2918 to Security. This sale was then confirmed by the bankruptcy court. At no time did respondents American or Westinghouse attempt to cure the tax delinquency to protect their interests in the subject property.

On March 12, 1968, long after the tax sale of the personal property to Security, the bankruptcy court granted the petitions of Westingtouse and American for the reclamation of the subject personal property. The order entered by the referee after summary hearing, directed Security to return the personal property purchased at the tax sale to Respondents.

Petitioner Security asserts title to the property through the tax sale, and both Petitioners deny the jurisdiction of the bankruptcy court to grant the order for reclamation upon a summary hearing.

REASON FOR GRANTING THE WRIT OF CERTIORARI

In order to effectuate the beneficial purposes of the Bankruptcy Act, with protection for both the debtor and the creditors, summary proceedings are provided for. These summary proceedings do not give the full procedural safe-

guards which are associated with a plenary hearing, but are tolerated so that the estate of the bankrupt can be quickly administered. The main thrust of this appeal tests the scope of summary bankruptcy proceedings under Chapter XI, and in particular, the power of a bankruptcy court to deprive claimants of a plenary trial.

The scope of the bankruptcy court's summary jurisdictional power in proceedings pursuant to Chapters I to VII was definitively settled by *Thompson v. Magnolia Petroleum Company,* 309 U.S. 478, 481 (1940). That case holds that possession or constructive possession of the property at the commencement of the proceedings is essential to confer summary jurisdiction to determine disputes concerning the property.

The court below, in agreement with some authorities, suggests that a different test should be applicable to determine the scope of summary jurisdiction in Chapter XI Proceedings. That interpretation is based upon 11 U.S.C. § 711.

> "Where not inconsistent with the provisions of this Chapter, the Court in which the petition is filed shall, for the purposes of this Chapter, have exclusive jurisdiction over the debtor and his property wherever located."

The language of the statute is broad and has resulted in confusion and direct conflict between the circuits as well as between commentators. One theory is that 11 U.S.C. § 711 has enlarged the summary jurisdiction of the Bankruptcy Court in Chapter XI proceedings—another disagrees. Among those who believe that this Section may enlarge the jurisdiction, there is disagreement as to the extent of such an increase.

The opinion of the court below leaves the issues which have created the confusion unresolved. The Court of Appeal was unwilling to rest the decision on any one ground for

summary jurisdiction, and covered every ground heretofore proposed by either court or commentator. The opinion and record thus present an opportunity to consider all jurisdictional tests under Section 711.

The theories considered in the court below can be briefly summarized. As an initial approach, jurisdiction is apparently premised on the fact that the debtor owned the property. (See court's opinion at pages 5-8 of Appendix.) The court below viewed 11 U.S.C. § 711 as enlarging the jurisdiction of the bankruptcy court in Chapter XI proceedings to include property owned by the debtor. However, after proceeding to this conclusion the opinion states that there is no "authoritative" (see court's opinion at page 8 of Appendix) basis for such a stand. Authority, the opinion states, however, clearly permits summary jurisdiction where both ownership and possession are present. (See court's opinion at page 9 of Appendix.) The opinion then distinguishes the decision of this Court (*Taubel-Scott-Kitzmiller Company, Inc. v. Fox*, 264 U.S. 426 [1964]), and concludes that there is both possession and ownership. Still unwilling to allow the decision to rest on this claimed distinction, or ownership alone, the court proceeds to buttress its jurisdictional conclusion on implied consent by all the parties.

On the merits, the opinion relies on a recent decision of the California Court of Appeals as dispositive of the respective claims. This case—*Dohrman Company v. Security Savings and Loan Association*, 8 C.A.3d 655 (1970)—considered a judgment on the pleadings and therefore could not be dispositive of the issues.

The hesitancy of the court below can be attributed to the complete confusion surrounding 11 U.S.C. § 711. With the increasing popularity of Chapter XI proceedings, these fundamental doubts as to the scope of the court's jurisdiction should be finally resolved.

This case presents an excellent opportunity for clarification. The record is, for the most part, stipulated. The hesitancy of the Court of Appeal to decide the issue of jurisdiction on any one ground allows this Court to consider the entire range of problem raised by the statute in one case. Each of the questions presented to this Court merits its review.

1. Does the Bankruptcy Court in a Chapter XI Proceedings Have Jurisdiction to Conduct Summary Proceeding Rather Than Plenary Proceedings Concerning Property Which Is Owned, But Not Possessed by the Debtor.

The circuits are split. The majority of the circuits following *Remington on Bankruptcy* (6th Edition, 1955) hold that ownership, without possession, is not sufficient to confer summary jurisdiction. The Ninth Circuit, however, following *Collier on Bankruptcy* concluded that ownership alone is sufficient.

The resolution of this dispute can only be accomplished by this Court. The reasons dictating an immediate resolution are many. First of all, jurisdiction defines the scope of a court's power to consider and resolve disputes. Swift and effective Chapter XI proceedings cannot be had without resolution of these fundamentals. Secondly, to the extent that this uncertainty results in the erroneous extensions of summary jurisdiction, claimants to property will be denied the procedural safeguards associated with a plenary hearing. And to the extent that this uncertainty results in the erroneous limitations of summary jurisdiction, the speed sought by summary jurisdictions for the protection of debtor and creditors would be lost. Finally, a debtor in considering an application to the court under Chapter XI will be tremendously affected by the disputes which can be resolved by that court.

Collier on Bankruptcy theorizes that Section 711 grants the bankruptcy court summary jurisdiction as to all property that the debtor owns. It is only in the secondary sense that the bankruptcy court may obtain summary jurisdiction over property which the debtor possesses. Collier states:

> "§ 311 gives the court in which the petition is filed 'exclusive jurisdiction of the debtor and his property, wherever located.' [11 U.S.C. § 711]. That jurisdiction over property rests on *ownership of property,* as distinguished from possession. There is no comparable provision in Chapters I-VII. With some exceptions, where a third party in an ordinary bankruptcy proceeding under Chapters I-VII has possession of the property involved and asserts a substantial adverse claim thereto, the bankruptcy court does not acquire summary jurisdiction over a controversy with respect to that property, even though ownership of the property is in the bankrupt. As a result of § 311, [11 U.S.C. § 711] however, the court in a proceeding under Chapter XI has summary jurisdiction over a controversy in that situation. § 311 [11 U.S.C. § 711] does not substitute ownership for possession as the basis for summary jurisdiction over controversies. The provisions of Chapters I-VII which confer summary jurisdiction upon the bankruptcy court in cases where it has actual or constructive possession of the property are not inconsistent with the provisions of Chapter XI, and hence are applicable in a proceeding under that Chapter." *8 Collier On Bankruptcy,* ¶ 3.02, pp. 176-179. (Emphasis added)

It seems that the opinion below and the previous decisions of the Ninth Circuit have adopted the general position of Collier that Section 711 enlarges the jurisdiction of the bankruptcy court to include summary jurisdiction on the basis of ownership alone. (See court's opinion at page 8 of

Appendix; see also, *Loyd v. Stewart and Nuss, Inc.*, 327 F.2d 642, 645 [9th Cir. 1964].). But the Ninth Circuit and Collier disagree as to why the bankruptcy court has summary jurisdiction over property the debtor owns. Collier premises his theory on the wording of Section 711 — "exclusive jurisdiction of the debtor and his property." 8 *Collier on Bankruptcy*, ¶ 3.02, p. 176. This language, it is asserted, points unequivocably to "ownership" in the debtor as the prime basis for summary jurisdiction. Collier's treatise suggests that the court in a Chapter XI proceeding has jurisdiction because of ownership, and secondarily because of possession, only because jurisdiction because of possession is "not inconsistent" with the provisions of Chapter XI. The ultimate conclusion reached is that if ownership is in the debtor, then notwithstanding a substantial adverse claim and lack of possession, the bankruptcy court has summary jurisdiction. See 8 *Collier on Bankruptcy*, ¶ 3.02, pp. 178-179.

The Ninth Circuit does not rely upon the precise wording of Section 711 but rather the asserted policy underlying Chapter XI proceedings. It is asserted that control over the alleged equity in property owned is essential to the economic success of a plan of arrangement even though possessed by another. The Ninth Circuit asserts that jurisdiction is primarily a function of possession, but ownership is also sufficient, not being "inconsistent" with provisions of the Chapter. To the Ninth Circuit it is not only "not inconsistent," but an absolute necessity.

The practical result of this theoretical divergence is that the Ninth Circuit does not enlarge jurisdiction as much as Collier would. The Ninth Circuit unlike Collier has refused to allow summary jurisdiction over property owned by the debtor which he does not possess and to which there is a substantial adverse claim. *Mithers v. Barasch*, 439 F.2d

1393 (9th Cir. 1971). Collier and the Ninth Circuit constitute one half of the split. Each asserts that ownership in the debtor is sufficient to confer summary jurisdiction under Section 711. Every other circuit which has considered the matter has considered possession essential to jurisdiction, as in the case of an ordinary bankruptcy pursuant to Chapters I to VII. The thinking of these circuits is in accordance with the treatise of *Remington on Bankruptcy.*

When the Ninth Circuit held that ownership was sufficient, it created the split in the circuits. It specifically noted that conflict in the case of *Wilke v. Country Life Insurance Company,* 423 F.2d 151 (9th Cir. 1970):

> "Appellant attempts to avoid the normal rule where possession is the test for summary jurisdiction by arguing that the instant proceedings are under Chapter XI and in Chapter XI proceedings, unlike ordinary bankruptcy proceedings, the debtor's ownership of property is sufficient to give the bankruptcy court summary jurisdiction. The two major bankruptcy treatises are in conflict on this point. Appellant relies on statement in *8 Collier On Bankruptcy,* ¶ 3.02, pp. 176-182, while appellees counter with a contrary view in *9 Remington On Bankruptcy,* § 3573, pp. 214-218 [6th Ed. 1955]. Although the matter is not free from doubt, case authority favors appellees' [*Remington's*] position. *Sada Yoshinuma v. Oberdorfer Insurance Agency,* 5 Cir., 136 F.2d 460, 461; *Lockhart v. Garden City Bank and Trust Company,* 2 Cir., 116 F.2d 658; *In re California Paving Company,* N.D.Ca., 95 F.Supp. 909." At 153.

The authorities favoring Remington believe that the jurisdiction of the bankruptcy court in Chapter XI proceedings is equal to, or less than, the jurisdiction of a bankruptcy court pursuant to Chapters I-VII. Remington asserts that:

> "It is well settled that jurisdiction of a bankruptcy court in ordinary bankruptcy proceedings does not extend to property which, although asserted by some of those in interest to belong to the bankrupt and his estate, is, at the time of the institution of the proceedings, in the possession of one claiming it adversely. This principal seems now to apply with full force to arrangement proceedings under Chapter XI. . . ." *9 Remington on Bankruptcy,* § 3574, p. 217, citing *Sada Yoshinuma vs. Oberdorfer Insurance Agency,* 136 F.2d 460 (5th Cir. 1943).

In Chapter XI proceedings when it comes to turnover orders such as the one in the case at bar, Remington relies upon possession alone as the basis for summary jurisdiction.

> "If would seem clear that under the broad grant of exclusive jurisdiction over property of the debtor, the court, in a Chapter XI proceeding, can summarily require anyone not an adverse claimant whose possession antedates filing of the petition in bankruptcy or for an arrangement, to turn over and surrender to it or to its authorized representative any property of the debtor in such person's possession." *9 Remington On Bankruptcy,* § 3576, p. 219.

So although Remington may allow some extension of the bankruptcy court's summary jurisdiction, ownership of the property is not the test. Possession, as in the ordinary bankruptcy proceeding, is the test.

The Second Circuit followed Remington in the case of *Lockhart v. Garden City Bank and Trust Company,* 116 F.2d 658 (2d Cir. 1940). In that case the debtor owned some property subject to a mortgage. The court found the jurisdiction of the court under Chapter XI limited to possession:

> "It is well settled, both in ordinary bankruptcy [citations omitted] and in corporate reorganization proceedings under old § 77B, [citations omitted], that property in the actual or constructive possession of the bankrupt when the petition is filed vests in the trustee and becomes subject to the exclusive jurisdiction of the bankruptcy court. Except where inconsistent with the provisions of Chapter XI, all provisions of Chapters I to VII, 11 U.S.C.A. §§ 1-112, are applicable to an arrangement proceeding (Bankruptcy Act § 302), the debtor in possession has the powers of a trustee (§ 342), and the court in which the petition for an arrangement is filed has 'exclusive jurisdiction of the debtor and his property, wherever located'. § 311." At 660.

The court in *Lockhart* refused to rivet jurisdiction to ownership. In fact, the court viewed Section 711 as *decreasing* the jurisdiction of the court. The court held that Section 711 confers upon the court in a Chapter XI proceeding those powers in an ordinary bankruptcy "except where inconsistent with the provisions of Chapter XII." See also *9 Remington*, § 3575.

The Sixth Circuit has followed Remington in the case of *Sada Yoshinuma v. Oberdorfer Insurance Agency*, 136 F.2d 460 (5th Cir. 1943), cert.den. 320 U.S. 785 (1943). The court held that 11 U.S.C. § 711 does not extend the jurisdiction of the bankruptcy court beyond the scope of a bankruptcy proceeding under Chapters I-VII. In that case, prior to the filing of the Chapter XI petition, a state receiver had taken possession of certain assets owned by the debtor. The debtor petitioned the bankruptcy court for an order requiring the state receiver to turn over the assets. The bankruptcy court denied the petition and the debtor appealed, contending that under 11 U.S.C. § 711 the bankruptcy court had exclusive jurisdiction of the debtor and the property which he owned. The court rejected

the argument and affirmed the order, holding that Section 711 does not extend the bankruptcy court's jurisdiction to ownership.

> ". . . the power of the bankruptcy court in a proceeding under Chapter XI is *not* greater than that of the court in ordinary bankruptcy proceedings. The filing by the bankrupt of his arrangement petition had no more effect to oust the jurisdiction of the State Court than the filing by his creditors of an involuntary petition in bankruptcy had." At 461. [Emphasis added.]

This split is obviously the result of the imprecise language of Section 711. The split is also the result of basic philosophical differences between the circuits concerning the nature and purpose of summary jurisdiction. The Ninth Circuit wishes to extend summary jurisdiction of the bankruptcy court to effectuate the basic policies behind Chapter XI. But the other circuits, following Remington, realize that the jurisdiction of the bankruptcy court is statutory and should not be enlarged without specific Congressional guidelines. More importantly, summary proceedings do not provide the litigants with all of the precedural safeguards which are usually considered essential to a fair hearing. In Chapter XI proceedings, or in other bankruptcy proceedings, a plenary hearing with its attendance safeguards should always be mandated except when policy considerations surrounding the Bankruptcy Act necessitate a summary proceeding.

In the case at bar, the referee, in a summary hearing, found that the court had power to determine title to substantial assets after a tax sale, even after the debtor, and all other creditors except the claimants, had relinquished any interest in the property. This summary determination of complicated issues should not be permitted when it serves no federal goal. Here the plan could not be aided

or affected by summary determination. Petitioners and respondents were the only parties who exerted any claim to the property. No matter who prevailed, it would in no way affect the bankrupt's estate or any possible plan of arrangement. The petitioner was not in possession of the property, nor did he own the property. The courts in the Second and Fifth Circuits would have remanded Respondents to a state court action, not only because there was no possession in the debtor (see *infra*), but also because deciding a dispute not affecting the debtor or his estate would be inconsistent with the provisions of Chapter XI.

2. If a Bankruptcy Court Can Conduct a Summary Proceeding When the Debtor Merely Owns the Property, Does the Debtor "Own" the Property When Title Remains in Another Pursuant to a Conditional Sales Contract?

What constitutes ownership? The court below obviously concluded that the debtor, Stockman, owned the property. Stockman did not have title to the property. At best, Stockman had an alleged equity. Title to the property remained in the conditional vendors. The question is whether this asserted right to an equity is "ownership" sufficient to confer jurisdiction? In the opinion below, the court concluded that Stockman's claim to ownership was sufficient to confer summary jurisdiction. Ownership thus encompasses more than title.

But it would seem that the Second Circuit and Collier would disagree with the Ninth Circuit. The Second Circuit has concluded, under the former Section 77B, that property held by the debtor as a conditional vendee was not "'property of the debtor' within the meaning of the statute . . ." *In re Lake's Laundry, Inc.*, 79 F.2d 326 (2d Cir. 1935). cert. den. 296 U.S. 626 (1935). The wording of Section 77B and Section 711 are identical. Both refer to "property of the debtor." Collier has concluded this Second Circuit

interpretation of Section 77B should be applied to construe Section 711. To this school of thought ownership means title, and in this case there would be no basis for the exercise of summary jurisdiction.

This points out another divergence between those who would enlarge summary jurisdiction. Collier would not extend summary jurisdiction to property over which the debtor did not have title. The Ninth Circuit, however, extends summary jurisdiction to property over which the debtor has an alleged equity. This further split adds additional confustion to the entire area.

3. Does a Bankruptcy Court in a Chapter XI Proceeding Have Jurisdiction to Make a Summary Determination Concerning Property Which Has Been Physically Seized and is in the Custody of Local Taxing Authority in Accordance with Applicable Statutes Prior to the Commencement of the Bankruptcy Proceedings?

The decision below, as an alternative basis for its decision, held that possession plus ownership which is not substantially disputed confers summary jurisdiction. (See court's opinion at p. 9 of Appendix.) Petitioners argued that there was neither possession nor constructive possession in the debtor at the commencement of the proceedings because of the prior seizure of the property by the taxing authority.[1] The Petitioners relied upon *Taubel-Scott-Kitzmiller Co., Inc. v. Fox,* 264 U.S. 426 (1924). In that case, within 4 months prior to the filing of a voluntary petition in bankruptcy, petitioner Taubel-Scott-Kitzmiller Co., Inc. levied execution upon personal property of a

1. That the property was seized is a matter of concession in the record by respondent despite the apparent confusion on the issue in the opinion of the Ninth Circuit. Respondent's brief before the Ninth Circuit states: "On March 30, 1966, the County seized the Edgewater *and its contents* for delinquent personal property taxes for the years 1965 and 1966." (Emphasis added.) See also the notices of seizure which were appended to petitioner's motion for rehearing before the Ninth Circuit.

bankrupt. Pursuant to the execution the sheriff took and retained exclusive possession and control of the property. The trustee in a summary proceeding attempted to set aside the lien and recover possession of the property. Petitioner seasonably objected to the exercise of summary jurisdiction.

Mr. Justice Brandeis, writing for a unanimous Court, held that the levy terminated the possession of the debtor and the trustee had no summary jurisdiction to attach the lien or to seek repossession of the property. The trustee's proper remedy was by plenary suit. Petitioners argued in the court below that *Taubel-Scott-Kitzmiller* controlled this case, the only variance being immaterial—substitution of the county tax collector for the sheriff. In either case, no constructive possession being in the debtor, summary proceedings could not be conducted.

Petitioner's argument was rejected and the Ninth Circuit attempted to distinguish *Taubel-Scott-Kitzmiller*. It is easy to see that the distinctions are not valid and that the decision below conflicts with that previous Supreme Court decision. The court below attempted to distinguish *Taubel-Scott* on two grounds.

First, the court tried to distinguish *Taubel-Scott* on the ground that it was "decided in 1924 under Chapters I-VII of the Bankruptcy Act and not under Chapter XI." (See court's opinion, p. 9 of Appendix.) Whether the decision was under Chapters I-VII or Chapter XI should be of no consequence when discussing the issue of possession or constructive possession. The only conceivable addition to summary jurisdiction under Chapter XI rests upon a claim of ownership, not possession.[2]

The second asserted basis for distinction is that the debtor, in this case, remained in possession after the seizure.

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2. See discussion of increased jurisdiction on basis of ownership under question numbers 1 and 2 of this Petition.

(See court's opinion at p. 11 of Appendix.) But there was no possession at the time of the filing of the petition as the keeper for the County was in possession. Any possession subsequent to the filing of the petition is clearly insufficient. The date for determining the extent of summary jurisdiction is the date of the filing, and subsequent activity is irrelevant. See *Lockhart, supra.* Furthermore, a debtor in possession pursuant to a chapter proceeding is not possession sufficient to confer summary jurisdiction. See *Lockhart, supra,* at 661. Finally, any possession by the debtor after the filing of the petition in bankruptcy was by stipulation. The stipulation provided that the removal of the keeper was without prejudice to Petitioner's right to challenge the jurisdiction of the court.

There is no distinction between *Taubel-Scott* and the case at bar, and the opinion below clearly conflicts with that Supreme Court decision.

4. Does a Party Who Appears Before a Bankruptcy Court, Stipulating to Reserve Objections to Jurisdiction, Consent to the Bankruptcy Court's Exercise of Summary Jurisdiction?

The record is clear that the Petitioner County of Alameda at no time conceded the jurisdiction of the Bankruptcy court. It contended that its prior seizure pursuant to the tax laws of the State of California ousted the debtor from possession, and consequently the court of jurisdiction.

If, as the County contended, the bankruptcy court had no jurisdiction, then the order of the District Court enjoining the sale scheduled for May 19, 1966, was void. Rather than violate the order and risk contempt, the County stipulated to allow the debtor to regain possession provided that regular payments were made on the delinquent taxes. By this stipulation the County attempted to reserve its jurisdictional objection.

That stipulation was the key to the immediate success or failure of the Chapter XI proceeding. That stipulation

gave the debtor his only chance to avoid bankruptcy. It gave him his hotel to operate and time within which to salvage his enterprise. Without that stipulation there would be no time and no hotel. The stipulation provided the most efficient and swift manner to assist the debtor without prejudice to the creditors.

The opinion below concludes that all parties consented to the jurisdiction of the bankruptcy court. (See court's opinion, p. 11 of Appendix.) In essence, the court held that the stipulation reserving the challenge to jurisdiction was ineffective. That holding discourages the stipulation which gave the Chapter XI proceeding its momentary breath of life. The decision assures the non-cooperation of taxing authorities and endangers Chapter XI proceedings not only in the 58 counties of California, but all over the United States.[3] By holding the stipulation to be ineffective, the court below has assured a jurisdictional dispute at the outset every time a taxing authority wishes to preserve its rights to a plenary hearing.

Furthermore, the decision of the Ninth Circuit places the tax collector in an unenviable predicament. He either concedes his jurisdictional dispute and foregoes his rights to a plenary hearing, or if he wishes to insist upon his jurisdictional claim and his right to a plenary hearing, his only alternative is to violate the injunction and risk contempt.

It is difficult to reconcile a decision which finds jurisdiction by consent in the face of an obvious effort by the attorneys to preserve the issue by a stipulation which was ap-

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3. Petitioners have found that at least the following states have seizure and sale provisions similar to those of California: Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah and Washington.

proved by the referee. Of greater concern are the practical problems created by that decision. It has endangered Chapter XI proceedings by assuring the lack of cooperation on the part of anyone who wishes to challenge jurisdiction and puts those who wish to challenge jurisdiction in an untenable position of being right or being in contempt. This holding can only encourage attorneys to disregard judicial orders at their risk. Obviously, a special or limited appearance to determine issues of jurisdiction is preferable.

THESE JURISDICTIONAL QUESTIONS CONCERNING SECTION 711 RAISE SIGNIFICANT AND RECURRING PROBLEMS AFFECTING THE NATURE AND SCOPE OF CHAPTER XI PROCEEDINGS.

Petitions pursuant to Chapter XI are an increasingly popular tool for avoiding bankruptcy, adjusting debts, and continuing the operation of troubled businesses. So that disputes concerning the bankrupts' estate could be quickly resolved, Section 711 was designed to provide for a swift adjudication, so that a plan could be effectuated as quickly as possible. This is in keeping with both the spirit and the beneficial effects of Chapter XI proceedings. It protects both the debtor and the creditors.

But the effectiveness of Chapter XI proceedings are being threatened by the maze of questions surrounding the court's jurisdiction. It is not clear whether Section 711 enlarges the jurisdiction of the bankruptcy court, and if it does, to what extent. If there is an increase, the courts are not sure as to the reasons for the increase, and so cannot analogize to adapt to new situations. In addition, there seems essential corollary questions as to constructive possession and consent to summary jurisdiction that are equally confused. This massive uncertainty presents not only recurring and significant practical problems, but requires for its solution fundamental and vital policy decisions which should be made by this Court.

The practical problems flowing from this confusion are many. Every Chapter XI proceeding is going to be crowded with questions and jurisdiction. The disputes and confusion are not only counter-productive in terms of speed sought through summary adjudication, but could also erroneously deprive some litigants of plenary hearings. Furthermore, there seems to be no adequate way to test jurisdiction despite this confusion, short of violating an order of the court.

But overriding these practical considerations is a more important policy decision. The decision involved is the careful balancing of complete procedural process with the nature and purpose of not only Chapter XI but the entire Bankruptcy Act.

Summary proceedings by their very nature deprive the litigant of the normal plenary hearing associated with procedural due process. Summary proceedings are tolerated in bankruptcy proceedings so that disputes can be quickly resolved. Through summary determination the bankruptcy act seeks to protect not only the debtor, but also his creditors. But since summary proceedings dispense with many of the safeguards inherent in a plenary hearing their use should not be extended beyond the absolute requirements of the Bankruptcy Act. Thus, the interpretation of Section 711 involves the careful balancing of the rights to a plenary trial with its attendant safeguards, with the nature and purpose of summary proceedings as provided for in the Bankruptcy Act. As a general proposition summary proceedings should not be tolerated when not required by the Bankruptcy Act. Each litigant should be entitled to the full realm of procedural safeguards.

But as noted before the summary determination below did not and could not effect the bankrupt or his estate. There was no reason in terms of Bankruptcy law for the exercise of summary jurisdiction.

5. Did the Court Below Err in Its Application of California Substantive Law Relative to Title Acquired by Purchaser at Tax Sale?

After the briefing and oral argument in the court below, the California Court of Appeals rendered a decision in an action entitled *Dohrman Co. v. Security Savings and Loan Association,* 8 C.A.3d 655, 87 Cal.Rptr. 782 (1970). As noted by the opinion below, the facts of the *Dohrman* case involved the same bankruptcy and the same actions by Security Savings and Loan Association. In both cases the complaining party was a secured creditor who objected to the effect of a tax sale extinguishing its security in subject property. The Dohrman Company (as petitioners have urged respondents to do) brought their action in state court.

The court below obviously felt that this parallel fact situation presented the applicable California substantive law. Referring to *Dohrman* the court stated:

> "Having determined that the Bankruptcy Court had summary jurisdiction to proceed it is clear that upon the authority of *Dohrman, supra,* Security here, as there, purchased at the tax sale with actual knowledge of the senior interest of both plaintiffs, just as it had purchased with such actual knowledge at the Trustee's sale some two weeks prior. Having done so it could not preclude the plaintiffs from asserting their superior lien because of the tax sale any more than Security could do so in *Dohrman.*" (See court's opinion at p. 15 of Appendix.)

Despite the unique situation in a federal court proceeding of having the precisely parallel fact situation occur in a state court action, the *Dohrman* case by its own limitations is not applicable. The error of the court below was in not properly recognizing the procedural status of the *Dohrman* case. The *Dohrman* decision was founded upon

a record consisting of a complaint, general demurrer and memoranda of points and authorities. The only question before the Court of Appeal was whether the complaint, with each allegation thereof assumed to be true, stated a cause of action. On this point, the court of appeal concluded, ". . . the title to personal property, taxed at the tax sale pursuant to Section 2918 [under which Security claims clear title], is not impervious to challenge for cause." *Dohrman* at 664.

The opinion in *Dohrman* describes the allegations of the complaint with careful precision.

> "It explicitly alleges that Security knew of plaintiff's claimed prior lien, *and* that it [plaintiff] had not received adequate notice of the tax sale which purportedly divested it [plaintiff] of title to the property. These allegations spell out a sufficient 'relationship', between Security and [plaintiff], to support a finding that the former is *estopped* to assert its tax title against [plaintiff]. (*Dinkelman v. Harrison, supra.*) The complaint therefore states a cause of action on this theory." (*Dohrman* at 665-666. Emphasis added.)

By placing their decision upon an estoppel and by the use of the conjunctive "and", the court specifically avoided any conflict with the case relied upon by petitioners, *R.C.A. Photophone Inc. v. Huffman,* 5 C.A.2d 401 (1935). The court in *Dohrman* states that knowledge by Security that plaintiff had not received adequate notice is essential to its finding of estoppel. This is in keeping with the California law of estoppel that the person raising the estoppel must be ignorant of the true state of the facts and without the means of obtaining that knowledge. *City of Long Beach v. Mansell,* 3 C.2d 465, 490 (1970). Furthermore, the person being estopped must be guilty of actual or constructive fraud and take advantage of this lack of knowledge. Both of these

requirements are strictly construed when applying estoppel to land titles. *City of Long Beach v. Mansell*, 3 C.3d at 491.

It is that vital ingredient of knowledge which was alleged in *Dohrman* that is absent from the record before this Court. That specific ingredient so essential to an estoppel cannot be found in the record; therefore, *Dohrman* is inapplicable. What the *Dohrman* decision did not do, which the language of the court below seemed to imply it did do, was either expressly or by implication overrule *R.C.A. Photophone*. *Dohrman's* reliance upon estoppel and the conjunctive "and" clearly distinguishes the two decisions, and when this distinction is appreciated, it becomes clear that *Photophone* is the applicable California substantive law.

In that case the plaintiff was the owner of personal property valued at $1,500 which had been leased. The lessee was only given a possessory right in the property and agreed to pay all taxes levied on it. This he failed to do and the tax collector seized and sold the equipment for $83 (the amount of taxes due) to the defendant. The plaintiff tendered the amount which the defendant had expended and demanded possession of the property. This demand was refused. In construing the then applicable provisions of California law relating to seizure and sale (which exist today in Sections 2914-2921, incl. of the California Revenue and Taxation Code) the Court first stated that property did not have to be assessed to the owner alone but could be assessed to anyone who possessed or controlled the property regardless of ownership. The Court, in effect, stated that the tax collector is mandated by law to collect taxes and in so doing must look only to the property itself from which the taxes are to be collected by seizure and sale without regard to ownership, prior or senior liens, etc. In short, these code sections dictating the manner of collection operate as "blinders" on the tax collector and rivet his attention upon the property itself. In holding that the

defendant was entitled to have the property free and clear of the plaintiff's claim even though what the defendant paid for it was far less than the value of the property the Court pointed out, at page 408, as follows:

> "The sale is for the benefit of the taxing body and it is expected that the price will bring it out whole. This is the first concern in tax sales and not that the owner may receive the reasonable value of his property. *If this were required there would be few bidders at tax sales because of the uncertainty of the title given and the probability of expensive litigation testing that title.*" [Emphasis added.]

What happened as a result of this holding was that defendant Huffman owned the sound equipment free and clear of any claim of R.C.A. The County, prior and subsequent to its seizure may or may not have known of R.C.A.'s claim (the point is not discussed). Such knowledge, or lack thereof, was nonetheless held to be no deterrent whatsoever to the County's power to seize the property, post it for sale (apparently without being required to give any notice to R.C.A.) and convey clear title thereto to the buyer.

Drastic repercussions can result from the failure of the Court below to recognize the vital distinction between *Dohrman* and R.C.A. Photophone. Doubt is cast upon tax titles and this must inevitably deprive the tax authorities of bidders. The federal court may have brought upon California the precise evil sought to be avoided in *Photophone*.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that writ of certiorari issue in order to review the decision of the Ninth Circuit.

Respectfully submitted,

BURD, HUNT & FRIEDMAN
JOHN S. BURD

By: JOHN J. BARTKO

By: JOHN J. WELSH

Attorneys for Petitioner Security Savings and Loan Association

RICHARD J. MOORE,
County Counsel

T. J. FENNOSE,
Deputy County Counsel

By: T. J. FENNOSE

By: JOHN J. WELSH

Attorneys for Petitioner County of Alameda

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 23,465

In the Matter of STOCKMAN DEVELOPMENT COMPANY, a Limited Partnership, composed of HARRY JAMES STOCKMAN, General Partner, and BETTY STOCKMAN, Limited Partner.

SECURITY SAVINGS AND LOAN ASSOCIATION; COUNTY OF ALAMEDA,

Appellants,

vs.

WESTINGHOUSE CREDIT CORPORATION, and AMERICAN ACCEPTANCE CORPORATION,

Appellees.

[August 11, 1971]

Appeal from the United States District Court
For the Northern District of California

Before: HUFSTEDLER, WRIGHT and TRASK, Circuit Judges.

TRASK, Circuit Judge:

This appeal is from orders of the district court affirming the action of the Referee in Bankruptcy who had granted petitions for the reclamation of personal property filed by the appellees, American Acceptance Corporation and Westinghouse Credit Corporation. The district court's jurisdiction was conferred by 28 U.S.C. § 1334 and that of this court by Section 24a of the Bankruptcy Act, 11 U.S.C. § 47a.

On May 18, 1966, an involuntary petition in bankruptcy was filed against the Stockman Development Company, a

limited partnership. The alleged bankrupt then filed a petition pursuant to Chapter XI of the Act, but no plan of arrangement was confirmed and there was ultimately an adjudication on January 3, 1968. The principal asset of the debtor was a leasehold estate from the Port of Oakland upon which the debtor had constructed the Oakland Edgewater Hotel or Edgewater Inn. American Acceptance Corporation (American) and Westinghouse Credit Corporation (Westinghouse) were the contract assignees of firms which had sold personal property consisting of hotel equipment for use in the Oakland Edgewater, by conditional sales contracts. The appellant, Security Savings & Loan Association, appeared throughout the proceedings as a secured creditor holding a deed of trust on the leasehold estate of the debtor and the building constructed thereon.

Some of the facts in the complicated history of the Oakland Edgewater are not made entirely clear in the record before this court and probably not before the district court. Except as may be hereafter indicated those facts disclose that the financial problems of the debtor became acute when the Tax Collector of Alameda County, California, seized the hotel property for unpaid taxes on March 30, 1966, and thereafter on May 10, 1966, posted a notice of public tax sale for May 19, 1966. Whether the personal property contents were also seized and scheduled for sale is one of the questions unclear on the record. In any event the proposed sale was enjoined by the district court and the debtor retained control as a debtor in possession under the authority of the Bankruptcy Court.

Both American and Westinghouse filed Petitions for Reclamation of the personal property asserting rights under conditional sales contracts antedating the bankruptcy by several years. The petition of American was filed on September 6, 1967, and that of Westinghouse on February 5,

1968. Hearings on these petitions were continued pending efforts to sell the entire property. On January 3, 1968, Chapter XI proceedings were terminated and the debtor was adjudicated a bankrupt. Thereafter on February 19, 1968, the trust deed of Security on the leasehold estate and hotel building was foreclosed in state court with the permission of the Trustee in Bankruptcy. Security had purchased the bankrupt's interest in the furniture, furnishings and chattels at a Trustee's sale on February 15, 1968.

On February 20, 1968, the Tax Collector with the consent of the Trustee noticed the sale on February 28, 1968, of the leasehold, fixtures, furniture and furnishings, and building for delinquent 1965 and 1966 taxes. Security immediately and voluntarily paid to the Tax Collector the tax delinquencies on the leasehold and buildings. Security did not pay the amount of taxes attributable to the personal property but permitted those items to go to sale and bid the full amount of taxes due on those items.

The Referee found that prior to the sale of the bankrupt's interest in the hotel property, including the personal property, Security had actual knowledge of the outstanding tax claims and the outstanding lien claims of American and Westinghouse, but that the latter were not notified of the pending sale. It was also found by the Referee that there had been a stipulation between American and Westinghouse and the Trustee that the conditional vendors would not reclaim the property until March 1, 1968, and that the administrative rent until this reclamation date was the sum of $1,650.00 which was paid.[1] The Notice of Tax Sale of the furniture, furnishings and chattels was posted by the Tax Collector on February 20, 1968, for sale on February 28, 1968. There was no actual notice given to either American or Westinghouse but the notice was

1. C.T. 236, Finding of Fact Number 7.

posted in three public places.[2] However, notice *was* given to Security, and Security officials and the Tax Collector met before the Tax Sale at which time Security agreed to pay the taxes on the leasehold and building.[3]

It is evident from the transactions with the Bankruptcy Court in which the Tax Collector participated as well as in the manner in which he listed the chattels that he was on notice of appellees' claims.[4]

Summary Jurisdiction of Bankruptcy Court

Appellants' first line of assault upon the orders of the District Court which affirmed the decision of the Referee in Bankruptcy granting the Petitions for Reclamation of the personal property consists of an attack upon the Referee's exercise of summary jurisdiction. Relying principally upon *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), appellant asserts that the summary jurisdiction of the Bankruptcy Court extends only to property in the possession of the bankrupt at the time of the filing of the petition in that court. Since the Sheriff of Alameda County is asserted to have gone into possession and seized the hotel and all of its contents for delinquent taxes and a public sale had been noticed on May 10, 1966, it is argued that the bankrupt was not in possession when the bankruptcy proceedings were filed some nineteen days later, and consequently there was no summary jurisdiction in the Bankruptcy Court to determine the competing rights to the personal property.

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2. The Referee made a finding of fact that no notice was given to Westinghouse, C.T. 235, No. 3, and C.T. 236, No. 8, or to American, C.T. 150, No. 3.

3. R.T. of March 25, 1968, at 28.

4. For instance, the notice which was posted as well as the bill of sale which the Tax Collector furnished Security lists items claimed by Westinghouse under a special category:

> "Items being purchased on Conditional Sales Contract from Westinghouse Credit Corp."

There appears to be complete agreement that under Chapters I to VII inclusive of the Act, the Bankruptcy Court has summary jurisdiction to determine controversies concerning property over which the bankrupt had actual or constructive possession at the time of the filing of the petition. 11 U.S.C. §§ 11, 110. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940); *Hollywood National Bank v. Bumb*, 409 F.2d 23 (9th Cir. 1969); *Suhl v. Bumb*, 348 F.2d 869 (9th Cir. 1965). Chapters I to VII are the provisions under which an estate is administered for the purpose of liquidation and distribution. Chapter XI on the contrary seeks an "arrangement" for the settlement or extension of time for payment of unsecured debts with protection of the debtor while the arrangement is being carried out. Jurisdiction for purposes of Chapter XI are contained in Section 311 of the Act.[5]

Collier on Bankruptcy interprets this language as a broadening of the jurisdiction of the Bankruptcy Court.[6] Remington is more guarded in its interpretation of the language of Chapter XI and blows both hot and cold on the question of enlarged jurisdiction. 9 Remington on Bankruptcy, Section 3573, pp. 214-218 (6th ed. 1955). It does cite and quote with approval from *Lockhart v. Garden City Bank & Trust Co.*, 116 F.2d 658 (2nd Cir. 1940), where Judge Clark says:

> "'But the mortgagee argues that the jurisdiction of the court and the title of the trustee under Chapter XI, unlike the situation in ordinary bankruptcy or in

5. § 711. Exclusive jurisdiction of debtor and property

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located." 11 U.S.C. § 711.

6. "That action gives to the Chapter XI court greater jurisdiction than is possessed by the court in an ordinary bankruptcy proceeding under Chapters I to VII." 8 Collier on Bankruptcy (14th ed. 1969) 3.01 at 166.

Chapter X proceedings, do not extend to property on which a lien is held, because an arrangement may not alter the rights of secured creditors, §§ 306(1), 307(1, 2), 357; nor did the arrangement actually proposed in this case purport to do so. *This, however, is not inconsistent with the exclusive jurisdiction of the court over mortgaged property.* Under ordinary bankruptcy, too, the rights of secured creditors may not be curtailed (former Act, § 67(d); present Act, § 57(h); In re American Motor Products Corp. (2 Cir.) 98 F.2d 774, 37 ABR NS 572); and the object of the court's control is not necessarily the curtailment of rights, but the supervision of their enforcement in order to protect the interests of other creditors, interests which would be substantial if the property proved to be more than sufficient to satisfy the secured debts. Isaacs v. Hobbs Tie & Timber Co. supra, 282 US at 738, 75 L ed 666, 51 S Ct 270, 17 ABR NS at p. 277.'" (Emphasis supplied). 9 Remington at 216.

The purpose of Chapter XI was to permit arrangements whereby financially troubled debtors could more easily pay their unsecured debts and remain in business. It is true that there appears to be no provision giving the Bankruptcy Court direct and express control over encumbered assets. However, control by that court over assets of substantial value with relatively small encumbrances would seem to be vital to the success of an arrangement.[7] Chapter XI does provide that except where inconsistent with other provisions of Chapter XI, all provisions of Chapters I to VII are applicable to an arrangement proceeding (Section 302, 11 U.S.C. § 702); that the debtor in possession has the powers of a trustee (Section 342, 11 U.S.C. § 742); and that the court in which the petition for an arrangement has been filed has "exclusive jurisdiction of the debtor and his property, wherever located." (Section 311, 11 U.S.C. § 711).

7. That is well illustrated here where the only substantial asset is the hotel property.

Nothing could seem to be more all-encompassing. Jurisdiction over the "debtor and his property" must necessarily include property owned but encumbered. Indeed, with a debtor in sufficient financial difficulties to be required to resort to the Bankruptcy Act it would be surprising to find very much of his property which was not encumbered. The same logic would require jurisdiction by the Bankruptcy Court as we hereafter point out.

As additional evidence that the Chapter XI jurisdiction was not intended to be restricted to a theory of possession, Section 314, 11 U.S.C. § 714 expressly gives the Bankruptcy Court authority to protect assets by injunction and to stay foreclosure proceedings—not just assets in the possession of the bankrupt.

The cases in this circuit on the point appear to be in some disarray. Our most recent treatment of a Chapter XI proceeding discusses the problem but does not resolve it. *Mithets v. Barasch*, 439 F.2d 1393 (9th Cir. 1971).

Earlier cases upon which appellant relies are distinguishable. For instance, *Thompson v. Magnolia Petroleum Co., supra*, arose under a different section of the Bankruptcy Act.[8]

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8. The general summary jurisdictional statement so frequently relied upon is as follows:

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1970) (Footnote omitted).

The footnote to that statement indicates that the Court relies upon *Harris v. Avery Brundage Co.*, 305 U.S. 160 (1938), a case decided upon facts arising prior to the passage of the Chandler Act and the enactment of Chapter XI. The jurisdictional section of Chapter XI is not mentioned in either *Thompson, supra*, nor in *Harris, supra*.

Taubel-Scott-Kitzmiller Co., Inc. v. Fox, 264 U.S. 426 (1924), relied upon by appellant, also antedated Chapter XI.

Four other decisions from this court are urged upon us by appellants. They are: *Kapelus v. A Joint Venture,* 377 F.2d 815 (9th Cir. 1967); *Suhl v. Bumb,* 348 F.2d 869 (9th Cir. 1965); *Kaplan v. Guttman,* 217 F.2d 481 (9th Cir. 1954); and *Evarts v. Eloy Gin Corp.,* 204 F.2d 712, 717 (9th Cir. 1953). *Kapelus* and *Suhl* were both Chapter XI proceedings. In both the court relied upon the summary jurisdiction holding and statement of *Thompson v. Magnolia Petroleum Co., supra,* n. 8, and no question was apparently presented as to the enlarging effect of Section 311. In *Kaplan* the proceedings were under the provisions for agricultural compositions and extensions, with the conciliation commissioner having the general jurisdiction of a Referee in Bankruptcy. *Federal Land Bank v. Costanien,* 116 F.2d 589 (6th Cir. 1941). In *Kaplan* as well as in *Evarts* an attempt was clearly being made to invoke the jurisdiction of the Bankruptcy Court in third party proceedings. Their value as precedents here are of little assistance to the court.

As pointed out in *Mithers v. Barasch, supra,* more recent opinions have held to the view that Section 311 (11 U.S.C. § 711) confers exclusive summary jurisdiction,

> ". . . to determine controversies with respect to property owned by the debtor *or* in the actual or constructive possession of the debtor or the Bankruptcy Court." *Mithers v. Barasch,* 439 F.2d 1393, 1395 (9th Cir. 1971).[9]

Barasch does not cite or comment upon the earlier decisions, and their authority on this narrow question of jurisdiction may not be taken as authoritative.[10]

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9. To the same effect, see 8 Collier on Bankruptcy, Section 3.02, p. 181:

> "Under Section 311, either ownership in the debtor at petition filed, or possession of the court, is a basis for summary jurisdiction over controversies."

10. Some of these earlier cases may indeed be distinguished on their facts and perhaps were by the panels writing the later opinions.

Barasch does, however, affirm as the rule of this circuit that the Bankruptcy Court does not acquire summary jurisdiction where the property is not in the debtor's possession and the debtor's title to it is disputed by a substantial adverse claim.[11]

Appellant relies upon *Taubel-Scott-Kitzmiller Co., Inc. v. Fox, et al.*, 264 U.S. 426 (1924) as controlling authority to establish that the personal property was not in the "possession of the bankrupt" at the date of the filing of the Chapter XI proceeding and therefore no summary jurisdiction attached. Appellant further asserts that here the Sheriff of Alameda County was in possession under a claim of right, just as the sheriff had seized the property in *Taubel-Scott*. Appellant paints with a broad brush. For one thing, *Taubel-Scott* was decided in 1924 under Chapters I to VII of the Bankruptcy Act and not under Chapter XI. Again, no finding was here made to the effect that the debtor was not in possession by either the Referee or by the district court. Appellant asserts that on March 30, 1966, the County seized the hotel together with the leasehold interest,

> "... and all fixtures, equipment, chattels and other assets situated on or about said leasehold and the building thereon and thereafter posted *said* property for sale on May 10, 1966." (Emphasis added) Appellants' Opening Brief at 8.

The record does not support that claim as to the personal property at issue in this case and neither the Referee

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11. *Loyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645 (9th Cir. 1964); and *Pasadena Investment Co. v. Weaver*, 376 F.2d 175, 178 (9th Cir. 1967). Here the legal title under the conditional sales contracts was reserved until the purchase price was paid, but no question has been raised by the assignees of those contracts who have filed Petitions for Reclamation and consented to summary jurisdiction.

could make nor the district court affirm such a finding. Appellant points to Volume Three of the Reporter's Transcript for proof of the seizure of the personal property here in question. At that point in the testimony before the Referee in Bankruptcy, Mr. James J. Scully, Supervisor of Personal Property Taxes, County of Alameda, identified the Notice of Sale of May 10, 1966. It was offered by appellant and marked as "Securities Exhibit No. 1." That document, however, does not pertain to the property before this court. It recites a seizure and notices for sale the following:

> ". . . the buildings known as the Edgewater Inn, located at 455 Hegenberger Road in the City of Oakland as well as taxpayer's right, title and interest in the ground lease upon which the buildings are situated."

There is no mention made of any personal property. Therefore, if the property seized was the "said" property offered for sale on May 10, 1966, the Notice of Sale does not support the claim of the Tax Collector's possession of the personal property on March 30, 1966. Following the Notice of Sale in 1966,[12] the debtor in possession remained in possession of the hotel property pursuant to stipulation with the County of Alameda approved by the Referee in Bankruptcy. It was not until February 20, 1968, that a Notice of Sale of personal property in the hotel was given. Long before this the petition had been filed and possession (if it was in fact in the debtor), passed to the Bankruptcy Court, irrespective of considerations of title.

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12. Appellee's brief before this court seems to admit the contention of appellants that the "contents" of the hotel were seized on March 30. In the absence of other evidence this admission would conclude the matter. Where the only evidence in the record before this court is to the contra, however, we could not find that the order of the district court which affirmed the findings and orders of the Referee, was clearly erroneous.

Apart from the confusion in the record as to just what was seized by the Tax Collector in the 1966 proceedings, in the present case the property appears to have been in the possession of the debtor in possession as well as the possession of the Tax Collector. Certainly there does not appear to have been any question raised by the Tax Collector about the debtor's title. ~~His seizure was dependent upon title being in the debtor. Unless the interest in the property taxed belonged to the debtor, the tax was improperly assessed.*~~ The Tax Collector thereafter entered into a stipulation approved by the Referee that the debtor should remain in possession while attempts to work on its financial problems were progressing. The possession of both the Tax Collector and of the debtor was as their interests might appear.

The Tax Collector claimed possession in order to assert a statutory lien to collect taxes in a limited amount. If the taxes were otherwise paid, his right to possession terminated. If a sale of a portion of the property generated sufficient funds to pay the tax liability, his right to possession of the remainder of the property terminated.

The jurisdiction of the Bankruptcy Court was recognized by all. The Referee's approval was obtained to all orders of importance and the debtor operated the property. All parties seemed to recognize that there was a significant potential value in the property which made it a possible asset of the estate of substantial value, over and above the claims of the secured creditors. Under these circumstances we are not persuaded that summary jurisdiction in the Bankruptcy Court and its implied finding to that effect was clearly erroneous.

Title Acquired at Tax Sale

Security argues that irrespective of its other contentions it can rest assured of the validity of the title it says it acquired by tax sale.

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*See Appendix B.

The factual setting for this argument goes back to the events of 1966 when the county seized *some* property of the debtor on March 30, 1966, and noticed the sale of "said" property on May 10, 1966. The "said" property noticed for sale did not include any furniture, furnishings or chattels, leading to the uncertainty noted before as to whether the chattels were in fact seized. In any event, the Tax Collector was no stranger to the bankruptcy proceedings. He entered into a stipulation in July 1966 with the debtor in possession under the Chapter XI proceeding which was approved by the Referee. The County Counsel obtained from the Referee on January 16, 1968, an order extending the time to February 19, within which the county could remain in possession of "that property of the above named bankrupt presently held under seizure." On January 30, 1968, the County Counsel prepared a different paper in the form of a stipulation permitting it to continue in possession of "that certain property known as the Edgewater Inn" (without describing the property) for an unstated time. This stipulation recited among other things that the Trustee does not concede Alameda County's right to be in possession, and claims it to be a trespasser. The stipulation reserved the claims of all parties and was signed by the County Counsel, the Trustee and the Referee.

American had filed a Petition for Reclamation on September 6, 1967, of its chattels and an order issued to show cause why its petition should not be heard, but the hearing was postponed. Westinghouse had done likewise on February 8, 1968.

The Trustee obtained an order for private sale and stipulated with American and Westinghouse that if the property remained unsold by March 12, 1968, he would then continued until March 12, 1968. The trust deed on the abandon it. The hearing on the reclamation petitions was

building and leasehold was foreclosed and Security obtained title to those major items. On February 13, 1968, the Trustee held a public sale of the personal property, offering to convey whatever interest the bankrupt might have. It was subject to the claims of American and Westinghouse and the tax claims. No bidders appeared and the property was then sold to Security on the same basis, i.e., subject to claims.

Having thus obtained the title to the buildings and leasehold by foreclosure of its trust deed, and having obtained the bankrupt's interest in furniture, furnishings and chattels subject to the liens of American and Westinghouse and subject to tax claims, it proceeded to attempt to purchase the property a second time from the Tax Collector.[13]

The Tax Collector, in disregard of its January 30, 1968, stipulation, in which the Trustee disputed the Tax Collector's right to possession and reserved the claims of all parties, and without actual notice to any of the parties claiming interests in these assets, including American and Westinghouse,[14] purported to conduct a public sale of the contested personal property. Security was apparently made aware of this sale and "bid in" his own property for the amount of unpaid taxes and received a bill of sale from the county. The Petition for Reclamation of American was granted March 12, 1968, and modified March 19, 1968, and that of Westinghouse was granted May 6, 1968,[15] Security

13. Mr. Richard Finnegan, a Director of Security, testified that at one meeting he had a conversation with the attorney for American suggesting that American be contacted because it looked to him "as if we'd be attempting to make a deal." R.T. Mar. 25, 1968 at 20. He further testified that when Security bought from the Trustee it paid $54,000.00 for the bankrupt's interest in the personal property. Id. at 25. He then testified that at the time of the Trustee's sale on February 13, 1968, he knew of the pending Petitions for Reclamation. Id. at 32.

14. The only notice given was notice by posting in three public places.

15. The modification is not material to this issue.

would urge that by these maneuvers and particularly its "bidding in" of the property at the tax sale it acquired a title which squeezed out the claims of American and Westinghouse although it was fully aware of each.[16]

The legal position of Security on these facts is that it does not rely on its title acquired from the Trustee on February 13, 1968, to defeat appellees' claims. Indeed, it cannot because that Trustee's sale was expressly subject to the claims of appellees and whatever rights they could establish upon the hearing of their pending Petitions for Reclamation. However, no one questions the fact that by the Trustee's sale, the payment of a substantial consideration thereon and its confirmation subject to existing lien rights and tax claims, Security did become the owner of the bankrupt's interest. The appellant, rather, relies upon the tax sale title. The appellees, however, contend that Security could not be a "purchaser" at a tax sale, but must be considered an owner redeeming its own property from outstanding taxes.[17]

Recently the California Court of Appeals has pointed out that a tax sale of personalty, unlike a conveyance of realty which has previously been acquired by the state by tax sale, does not convey an unimpeachable title. *Dohrmann*

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16. Findings of Fact of Referee with respect to knowledge of Security of lien claims of Westinghouse and American at date of Trustee's sale on February 13, 1968. C.T. at 150.

Security also in its own proposed findings of fact acknowledged with respect to the Trustee's sale on February 13, 1968, that (1) it knew the sale to it was made subject to claims set out in reclamation petitions and (2) that such sale was made without notice. C.T. at 134, Proposed Findings 9 and 10.

17. With respect to the buildings and leasehold estate which Security had obtained by foreclosure of its trust deed, Security did not "purchase" this property again at tax sale, but went to the Tax Collector after the Notice of Sale had been posted and paid the taxes, thus redeeming the property before the sale was held. Appellee points out that it could have followed the identical procedure with respect to the sale for personal property taxes, and that, in substance and in fact, was what occurred.

Co. v. Security Savings & Loan Association, 8 Cal. App. 3d 655, 87 Cal. Rptr. 792 (1970): That case involved a different lot of chattels in the same bankruptcy proceedings and Security had followed the same format, i.e., Security had acquired the bankrupt's title on both realty and chattels and voluntarily paid the real property taxes before the noticed sale, but let the chattels go to "sale" where it bid them in for taxes rather than redeem them from taxes as an owner. Security then claimed it had acquired a title by tax sale free and clear of Dohrmann's prior lien claims.

The trial court in *Dohrmann* after general demurrers by both sides treated the matter as submitted with the allegations in the complaint taken as true. It entered judgment on the pleadings in favor of defendant Security and the Tax Collector, also a defendant. The District Court of Appeal reversed the judgment; holding alternatively that the tax sale was invalid for insufficient notice and that upon the facts Security was not in a position to preclude Dohrmann's senior interest when it purchased the tax title at the sale.[18] *Dohrmann, supra*, 8 Cal. App. 3d at 663.

Having determined that the Bankruptcy Court had summary jurisdiction to proceed it is clear that upon the authority of *Dohrmann, supra*, Security here, as there, purchased at the tax sale with actual knowledge of the senior interest of both plaintiffs, just as it had purchased with such actual knowledge at the Trustee's sale some two weeks prior. Having done so it could not preclude the plaintiffs from asserting their superior lien because of the tax sale any more than Security could do so in *Dohrmann*.

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18. The court noted that the defendants had argued that relief to the plaintiffs should be denied because the plaintiffs did not exercise diligence in protecting their claims. *Dohrmann Co. v. Security Savings & Loan Ass'n.*, 8 Cal. App. 3d 655, 666, 87 Cal. Rptr. 792 (1970). That issue is not raised in this appeal nor does it appear to have been urged below.

It is not necessary to determine the question of the invalidity of the tax sale because of lack of adequate notice, although the circumstances point strongly to that conclusion here as well.

EXHAUSTION OF JURISDICTION OF BANKRUPTCY COURT BY CONFIRMATION OF SALE OF CHATTELS

The other issue raised by the appellants is the effect of the confirmation by the Referee of the Trustee's sale of personalty on the jurisdiction of the Bankruptcy Court to rule on the Petitions for Reclamation. The petition of American was filed on September 6, 1967, and that of Westinghouse on February 5, 1968. Orders to show cause were issued when the petitions were filed but hearings thereon were continued from time to time presumably to permit attempts to sell the hotel as an operating unit since the personalty involved included furniture and furnishings. The last continuance as to Westinghouse was by stipulation between the petitioner for reclamation and the Trustee to the effect that petitioner would not reclaim its property until March 1, 1968, and that the administrative rent for the period from adjudication until March 1, 1968, would be the sum of $1,650.00.[19]

The petition as to American was granted on May 2, 1968, pursuant to Findings and Conclusions as of that date,[20] and that of Westinghouse as of May 6, 1968.[21]

The Trustee's sale of the bankrupt's interest in the personal property took place on February 13, 1968, while

19. Referee's Finding No. 7, C.T. 236, Westinghouse. The Finding of the Referee as to American was somewhat different in that the stipulation and rental items were not mentioned. C.T. 149-150.

20. C.T. 148-151. The order granting reclamation was entered March 12, 1968, and modified May 6, 1968. C.T. 144-146.

21. C.T. 234-237. The order granting reclamation was entered on May 6, 1968. C.T. 221-223.

both petitions for reclamation were on file and pending. Both the sale and the confirmation were made without notice to the petitioners, although Security had knowledge of the prior claims of American and Westinghouse and of the pending Petitions for Reclamation.[22]

The sale and the confirmation made it plain that the title which Security acquired from the Trustee was subject to the claims of American and Westinghouse as evidenced by their Petitions for Reclamation and also subject to unpaid taxes.[23]

Yet Security contends that the Bankruptcy Court lost jurisdiction to determine the very claims filed with it, because the Trustee sold subject to the unresolved claims. One of the functions and responsibilities of the Bankruptcy Court is to allow or disallow claims against bankrupt estates. 11 U.S.C. § 11 (2).

> "Nevertheless the Bankruptcy Court has the power to determine the manner in which liens against property of the bankrupt coming into its hands may be enforced in order to protect whatever equity there may be for the general creditors and may sell the property either free and clear of liens or subject to them. Van Huffel v. Harkelrode, 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256 (1931)." *In re Bernhard Altmann International Corporation*, 226 F.Supp. 201, 205 (S.D.N.Y. 1963).[24]

Security recognized the personal property in contention here as an asset of the bankrupt estate when it negotiated with the Trustee for the purchase of the bankrupt's interest and paid a substantial sum of money for it. The Peti-

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22. Referee's Findings, C.T. 148-151; 234-237. Conversation between Security's Board Member Finnegan and attorney for American. R.T. March 25, 1968 at 20, 32.

23. Appellants' Opening Brief, p. 11.

24. Also *In re Dennis Mitchell Industries, Inc.*, 419 F.2d 349 (3rd Cir. 1969).

tions for Reclamation which it agreed to have determined were petitions filed in the Bankruptcy Court before the Referee and subject to his determination. It therefore consented to further jurisdiction of the Bankruptcy Court for that purpose.

Security relies upon *In re Paddock of California*, 226 F.Supp. 43 (S.D. Cal. 1964) for support. We do not find that *Paddock* helps Security. In that case a Receiver in a Chapter XI proceeding sold assets of the debtor among which were three trade names. As one of the terms of sale the Receiver agreed to defend the buyer against unauthorized use of those names by others during a limited period. When the petitioner, a third person not involved in the bankruptcy proceeding, attempted to use one of the names, the Receiver applied to the Bankruptcy Court in proceedings designed to obtain an injunction. The petitioner asserted lack of jurisdiction and was sustained. The action which the Receiver proposed involved a collateral proceeding with third persons. Here the asset was in control of the Bankruptcy Court for purposes of administration, the Trustee was an official of that court and the proposed purchaser and the holders of the prior liens had all invoked the jurisdiction of the court. The matter of the determination of the validity of the Petitions for Reclamation was still a matter very much in the bosom of the court.

The judgment of the District Court is affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit
No. 23,465

Filed Oct 8 1971
Wm. B. Luck, Clerk

In the Matter of STOCKMAN DEVELOPMENT COMPANY, a Limited Partnership, composed of HARRY JAMES STOCKMAN, General Partner, and BETTY STOCKMAN, Limited Partner,

SECURITY SAVINGS AND LOAN ASSOCIATION, COUNTY OF ALAMEDA,

Appellants,

vs.

WESTINGHOUSE CREDIT CORPORATION, and AMERICAN ACCEPTANCE CORPORATION,

Appellees.

Upon the Petition for Rehearing it is ordered:

1. The following two sentences in the first full paragraph on page nine of the printed slip opinion are hereby deleted:

> "His seizure was dependent upon title being in the debtor. Unless the interest in the property tax belonged to the debtor, the tax was improperly assessed."

2. The Petition for Rehearing is denied.